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CURRENT TOPICS.

In *State v. Cowell*, 12 Nev. 337, the defendants were jointly indicted for the crime of burglary in entering the dwelling house of one Alderson with intent to steal. Upon the trial, one of the defendants, on behalf of the state, was allowed to testify that a few days before the commission of the burglary, he and the other defendants agreed to commit a robbery on the person of Alderson, but that they did not rob him because the witness told them that he had nothing with him to be robbed of. The Supreme Court of Nevada held the evidence relevant and admissible as tending to prove the intent of the defendants in entering the dwelling house. In Rex. v. Ellis, 6 B. & C. 145, the court say: "Generally speaking, it is not competent for a prosecutor to prove a man guilty by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, the one is evidence to show the character of the other." Mr. Roscoe (Roscoe Crim. Ev. 86) cites a case referred to by Lord Ellenborough in Rex v. Whiley, 2 Lea. 985, where a man committed three burglaries in one night, and stole a shirt in one place and left it in another, and they were all so connected that the court heard the history of all three burglaries, and Lord Ellenborough remarked that "if crimes do so intermix, the court must go through the detail." See also Pierce v. Hoffman, 24 Vt. 527; Bottomley v. United States, 1 Story 142; Baalam v. State, 17 Ala. N. S. 453; Dunn v. State, 2 Ark. 243; Com. v. Call. 21 Pick. 522; Dunn's Case, Moody 150; Rex. v. Wylie 4 Boss & Pull. 92; Rex. v. Long, 6 C. & P. 383: Rex. v. Mogg, 4 C. & P., 555; Rex. v. Egerton, 1 Ross & Ryan 375; Thorp. v. State, 15 Ala. N. S. 757.

In *Marshall v. The State*, 6 Neb. 121, the defendant was indicted, in Nebraska, for the forgery of a school bond, and pleaded a former conviction in a prosecution against him under another name in the state of Illinois, to which he had pleaded guilty. The plea further showed that he had been discharged by the Illinois court, and the prosecution stricken from the docket. The Supreme Court of Nebraska affirmed the decision of the court below sustaining a demurrer to the defendant's plea. The principle seems well settled that the laws of a country do not extend beyond its territorial limits; and, therefore, it is said to be "an obvious principle that the maxim and rule of constitutional law can not span country and country in such a way as to cause a jeopardy in one country to free the party from trial in another. On the one hand, it can not prevent a foreign government from prosecuting for crime a person who has been tried for the same offense by our courts; and, on the other hand, it can not exempt from prosecution here one who has been tried abroad." 1 Bish. Crim. Law, § 983. And if a man offends against two governmental powers, which equally bind him, it is not easy to see why "his paying the penalty of the law to one power should relieve him from liability to pay the penalty of the law to the other power. Still, though the strict rule of the law would be so, yet as a sort of merciful dispensation the courts would undoubtedly consider favorably to the defendant the fact, if it existed, that he had been punished for the same act in a foreign country." Ibid., § 986. But it seems that, in order to make such punishment for the act in a foreign country a satisfaction and a bar to a future trial, upon the ground above stated, it is necessary that "it should be complete and should have been executed to its full extent." Whart. Conf. Laws, § 934.

The first reported case in which a court has been called upon to apply the law of bailments to the modern institution called a safe deposit company, is that of *Safe Deposit Co. v. Pollock*, 35 Leg. Int. 113, recently decided by the Supreme Court of Pennsylvania. The action was brought to recover for the loss of certain government bonds which had been placed with the defendant. The plaintiff rented a safe in the burglar-proof vault of the company, subject, *inter alia*, to its following rules and regulations: "Whenever a party rents a safe, and deposits therein at pleasure, contents not being made known to the company, its liability is limited: 1. To the keep-

ing of a constant and adequate guard and watch over and upon the burglar-proof safe. 2. To the prevention of access by any renter to the safe of any other renter. 3. To the protection of safes and contents from any dishonesty on the part of any of the company's employees." The plaintiff had exclusive possession of the key to the safe, and had placed the bonds in it. Subsequently he discovered them to be missing. There was no evidence that the vault or the safe had been broken nor that the lock had been tampered with, so that it followed that it had been opened with a key suited to the lock. The court held that there was evidence of negligence on the part of the company sufficient to go to the jury, and sustained a verdict for the plaintiff. The case was not, said the court, like that of Finucane v. Small, 1 Esp., 315, where the trunk of the bailor was delivered to the bailee for safe custody, there being no express agreement as to the care to be exercised; nor like that of Farnham v. C. & A. R. R., 5 P. F. Smith, 53, where it was held that proof merely of loss was not sufficient to put the bailee on his defense. The evidence did not stop with merely showing the loss. It showed the bonds had been abstracted by some one entering the vault, and opening the safe by means of a key. The presumption of want of ordinary care was thereby created. All the evidence calculated to rebut that presumption was properly left to the jury.

An important decision as to the liability of railway companies for passenger's luggage was made in the English Court of Appeal in the recent case of *Bergheim v. The Great Eastern R'y Co.* The plaintiff was traveling on the defendant's railway. He arrived at the station some time before the train was to start, and he directed one of the defendant's porters to place his traveling bag in the carriage in which he intended to travel. The porter did so under the plaintiff's superintendence, and the plaintiff, after inquiring of the porter if the bag would be safe, and receiving a reply in the affirmative, went to another part of the station to get some refreshment. On his return to the carriage the bag was not to be found. To recover the value of the bag the plaintiff brought action. At the trial, the jury found that neither the plaintiff nor the defendant had been guilty of negligence, and on these findings the judge gave judgment for defendants which was affirmed on appeal. In commenting upon this case, the *Law Times* says: "That railway companies carry passengers' luggage as insurers may be considered as settled by Macrow v. Great Western Railway Company, L. R. 6 Q. B. 612, although the question has never been expressly decided by the Court of Appeal. But in Talley v. Great Western Railway Company, L. R., 6 C. P. 44, it was held by the Court of Common Pleas that if luggage be placed in a railway carriage with the passenger, with his assent, and he retains control over it, the company's liability as insurer ceases, and they become liable for negligence only; and this view of the law has been affirmed by the Court of Appeal in Bergheim v. Great Eastern Railway Company. Lord Justice Cotton, in delivering judgment for the company, appears to have rightly distinguished the case of a passenger retaining control of his luggage and the ordinary case of luggage being consigned to a van. But the strong point for the plaintiff appears to have been that the porter promised him that his bag would be safe. With regard to this, however, it seems that the porter would have no authority to give such a promise, so that the judgment appears to be quite correct. The case is rather an important one, not so much from the difficulty of the question of law involved, as from the frequency with which railway passengers absolve the companies from their liability as insurers. And there are few lines upon which a railway porter will not, on the slightest hint from a passenger, place luggage in a railway carriage."

THE DEGREES OF MURDER. I.

Homicide, of which in our state murder in the first degree is the highest and most criminal species, is of various degrees. In its largest sense the term is generic, embracing every mode by which the life of a "reasonable creature in being" is taken by the act of another. The term is from the Latin *homo*, a man, and *cedere*, to kill (1 Bouvier's Law Dictionary) and is defined to be "the killing of any human creature," 4 Black. 177; "The killing of a man by a man," 1 Hawk. Pl. Cr. C. 8, Sec. 2.

Our statute does not define the crime of murder in either degree, but only classifies

and arranges it into two degrees and affixes the punishment for each. The statute does define *justifiable* and *excusable* homicide, and, as the terms imply, holds the perpetrator guiltless. It also defines various other kinds of homicide, which are arranged and defined in twelve sections and constitute four degrees of manslaughter. The law does not punish "the killing of a man by a man," but it does punish *particular modes of killing*, and our statute has graded the punishment for the various modes, from death by the halter for the highest, down to a fine of one hundred dollars for the lowest.

The facts from which the judicial investigator must determine the mode of the killing in a particular case must be considered in the concrete, The fact that A killed B, considered in the abstract, furnishes the judicial investigator no matter for investigation; for A may have been a wayward boy and killed his mother by his misconduct, breaking her heart; or he may have been a robber and killed by lying in wait, and the abstract fact that A killed B, furnishes no clue by which the mind can even conjecture whether the killing was by the one mode or the other, But in real causes in court, there are always some facts and circumstances connected with the killing, either precedent, concomitant or subsequent, from which the mode of killing may be fairly inferred, and the killing, if not justifiable or excusable, may be assigned to its appropriate degree.

In order to a clear comprehension of the degrees of murder under our Missouri law, the judicial investigator, whether court, counsel or juror, should array before his mind, as upon a map, all the modes of killing comprehended by the term homicide—the death of man by human agency; and proceed negatively to collect and detach from the group such killings as are clearly not murder in either degree. To commence this mental process, we need not grope amongst the books to determine what is *justifiable* and what *excusable* homicide, for they are defined by statute. 1 Wagn., 446, Sections 4, 5 and 6. When all the modes of killing contemplated by these sections are detached from the group on our canvass, the picture is greatly reduced, for these sections include the greater number of the modes in which man is killed by man. So that it may be said the common course of taking life among us is lawful. 2 Bish. Cr. Pr., Sec. 607. But the mental process must not stop here. Our canvas is still crowded with various other modes of killing which are not murder. Here, again, we may save the labor of poring over the learning of the ages to determine what manslaughter is, for our statutes have declared what particular modes of killing constitute manslaughter in each of its four degrees. Let no judicial investigator into whose hands these pages may come, proceed further until he shall have correctly read and studied 1 Wag. 446-448, Sections 4 to 18 inclusive, and not depend upon any previous reading or study of the subject. Having substracted these various modes of killing, which under the statute constitute justifiable and excusable homicide and manslaughter in all the degrees, from our canvas, our way seems clear for the examination of those of a more atrocious character which are left. This mode of examination may, at first view, seem illogical; but when it is considered that some modes of killing, which at the common law were deemed to be murder, are by the statute classified and defined as manslaughter, we find, in order to get a clear view of murder in the second degree, we must substract from all the modes of killing those which are justifiable and excusable as well as those which constitute manslaughter in the various degrees.

We have left on our canvas only murder; and only such murders at the common law as are not, by statute, declared to be manslaughter or justifiable or excusable homicide. But of the kinds of killing left for examination, some are deemed more atrocious than others. Indeed, the human mind could scarcely be content with the equal punishment of two, one of whom, being thereunto greatly provoked by words and gestures, kills his neighbor on the instant with the weapon most convenient to his hand, and the other, who, in a deep seated revenge, goes at the hour of midnight and stealthily puts poison in his neighbor's food and thereby destroys a whole family. Hence our law makers have culled from all the modes of killing which constitute murder at the common law, those of the most heinous character and have classed them as murder in the first degree, and fixed capital punishment as their corrective; while all other murders at the common law, not by statute declared to be manslaughter or justifiable or excusable hom-

icide, are classed as murder in the second degree and their punishment fixed at imprisonment in the penitentiary for a term of not less than ten years.

Before we proceed to the further examination of the kinds of killing which constitute murder in each degree, it will be profitable to inquire what kinds or modes of killing constitute the crime of murder, as known to the common law. While it is a source of regret that with all the learning of the books, and all the efforts of the greatest minds the world has produced in ancient and modern times, human thought and human language have proved too poor to give a definition of the term *murder*, fully acceptable to the profession, or in the absolute correctness of which the profession can unite; still, for all the practical purposes of actual causes, the definitions given by the leading English and American authors are deemed sufficient.

Murder, as usually defined, is "where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the commonwealth, with malice prepense or aforethought, either express or implied." 3 Int. 47, 51, 2 Ld. Raymond, 1487; 1 Hale 425; 1 Hawk. ch. 31, §§ 3, 8; 4 Black. Com. 198. Murder is distinguished from other kinds of killing by the condition of malice. Wharton on Hom., 2d ed., § 3. Mr. Bishop, in his valuable work on criminal law, vol. 2, § 652, after quoting the definition of Hawk. P. C., p. 92, § 3, says: "A better definition is the following: Murder is any act committed from what the law deems a depraved mind bent fully on evil, the result of which act is the death of a human being within a year and a day from its commission."

Mr. Wharton, in his work on Homicide, sec. 3, after quoting the definition first above given, and pointing out its ambiguity, says: "In order, therefore, to understand what murder is, we must study the subject in the concrete. When each particular case is presented to the jury, terms can readily be found in aid of the common law or statutory definition to reach the merits of such case. But a definition which is large enough to cover all cases in advance must be necessarily so general that each of its leading terms requires a new definition to make it exact."

Of the terms employed in the definition first above given, malice would seem to require a special examination.

Malice is a condition of the mind; and while it exists only in thought, no liability attaches, for it is but the internal will; but when there is an overt wrongful act, likely to cause death or bodily harm, between which and the will there exists the relation of cause and effect, then it constitutes that condition of the mind which is termed malice. If A, having the internal will to kill or to do serious bodily harm to B, using an instrument likely to produce death or great bodily harm, strikes and kills B—not in the heat of passion—(which is an external act, having a causal relation of the will to the act), malice is present at the killing, and the crime is murder; but if malice did not exist at the time of the killing, if a crime at all, it is only manslaughter. "Malice," says Mr. Wharton, in his admirable work already quoted from, sec. 18, "may be defined as evil intent; and may, for the purposes of this treatise, be regarded as convertible with *dolus*." Our terms malice and negligence correspond to the *dolus* and *culpa* of the Roman law; our direct and indirect malice, or malice express and implied, to the *dolus directus* and *dolus indirectus* of the Romans. Direct malice exists where A killed B intending to kill. Indirect malice exists when there is no specific intent to kill; but when death naturally results from the blow inflicted or the means employed, as when A, intending only to seriously hurt B, strikes and inflicts a mortal wound from which death naturally follows. It will be observed that I have employed the terms direct malice and indirect malice as the equivalents of express malice and implied malice. In the use of the latter form of expression, the mind can not grasp and comprehend the ideas conveyed and rest with a quiet assurance that it has mastered the thought, and stand prepared, as a surveyor with his compass and chain, to mark its boundaries. Lord Hale, after defining malice in fact, says: "The evidences of such malice must arise from external circumstances discovering that inward intention." I can not conceive of the existence of malice—that is, the internal will accompanied by the external or instrumental act—but that it would be evidenced by "external circumstances discovering that inward intention" or will. And my own mind finds no rest when contemplating the term, "implied malice," so much used in the books, only as applied to the inference of malice generally, from the facts and circumstances—precedent,

concomitant or subseqnent—connected with a killing. Mr. Wharton, in the work already quoted from, section 36, says: "Yet it must be admitted that the distinction between express and implied malice, approved as it is by the old standards, is unsustained by sound reason. There is no case of homicide in which the malice is not implied; none in which it is not inferred from the circumstances of the case. * * * We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer his intent, more or less satisfactorily, from his acts."

Malice, in fact, is defined by Lord Hale to be "a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized." Hale's P. C. 451. Mr. Wharton, in stating the doctrine of the old authors, in respect to malice, says: "Express malice is said to exist when one person kills another with a sedate, deliberate mind and formed design. * * * * Malice is *implied* from any deliberate, cruel act committed by one person against another, however sudden." Whar. on Hom., sec. 35. This is a clear statement of the old doctrine, but in his next section, from which I have already quoted, Mr. Wharton lays down the proposition that there is no case of murder in which the malice is not implied; none in which it is not inferred from the circumstances of the case, and this position is fortified by Mr. Wharton in his work on Homicide by arguments at once conclusive and unanswerable. In State v. Wieners, 6 Cent. L. J. 70, Henry, J., in delivering the opinion of the court, after quoting Lord Hale's definition of malice, in fact, says: "Malice is a condition of the mind, the existence of which is inferred from acts committed or words spoken. It is that condition of the mind which shows a heart regardless of social duty, and fatally bent on mischief. To constitute a killing murder, there must be malice aforethought—not that the malice should be thought of beforehand, which would be absurd, as it is but a condition of the mind—but that the act prompted by this malice should be thought of before, and it signifies properly a homicide, intentionally committed with malice. * * * To constitute murder, the killing must be with malice aforethought—that is, an unlawful intention to take life must precede the killing." I should conclude, by the latter part of the quotation, the learned judge refers to murder in the first degree, were it not for the following subsequent clauses: "Can there be malice aforethought where there is no intention to kill? There are cases at common law with which, apparently, the doctrine that an intent to kill is of the essence of murder is in conflict, but the conflict is only apparent. If one, in perpetrating, or attempting to perpetrate a felony, kill a human being, such killing is murder, although not specifically intended, for the law attaches the intent to commit the other felony to the homicide. The law conclusively presumes the intent to kill." After this statement of the proposition, the learned judge proceeds to quote from the books numerous illustrations, not one of which, to my mind, supports the doctrine of the proposition, viz.: that the law presumes an intention to kill, from an intent to commit a collateral felony. But each of the illustrations are sharply in point in support of the proposition hereinbefore stated, that indirect malice exists where there is no specific intent to kill, but where death naturally results from the blow inflicted, or the means employed. One of the clauses quoted by the learned judge in the Wieners case, puts the case in the clearest possible light, viz.: "The act itself must be unlawful, attended with probable serious danger, and must be done with a mischievous intent to hurt people, in order to make the killing amount to murder in these cases, for it is from these circumstances that the malice is to be inferred."

From an examination of the whole question, upon principle and authority I conclude that malice, as an ingredient in murder, is a condition of the mind evidenced by the intentional doing of a wrongful act, not in the "heat of passion," which might reasonably be expected to result in death or bodily harm to some human being.

Every killing of a human being by the act of another with malice, as above defined, is murder; and our next duty is to erase from our canvas all the kinds of killing which our statute has declared to be murder in the first degree. It should be observed that the mode of killing, to constitute murder in the first degree under the statute, must be such, without the distinctive feature mentioned in the statute, as to constitute murder at the common law, for the statute

does not provide that every homicide which shall be committed by means of poison, etc., but that every *murder* which shall be committed, etc.

Under the first section of the statute, 1 Wag. 445, there are a class of murders known by a particular description, and a class known by a general description, which constitute murder in the first degree. Those known by a particular description are as follows: 1. When committed by means of poison. 2. When committed by lying in wait. 3. When committed in the perpetration or attempt to perpetrate arson. 4. When committed in the perpetration or attempt to perpetrate rape. 5. When committed in the perpetration or attempt to perpetrate robbery. 6. When committed in the perpetration or attempt to perpetrate burglary. 7. When committed in the perpetration or attempt to perpetrate any other felony.

The murders specified in the first section, which may be known by general description, are placed in the section immediately following the first two known by special description, viz.: by means of poison or by lying in wait, and are, when committed "by any other kind of willful, deliberate and premeditated killing." Murders, committed in the perpetration or attempt to perpetrate, arson, rape, robbery, burglary or other felony, are not murders by reason of the law attaching the intent to commit the collateral felony to the homicide, for it must be *murder* at the common law, and hence there must be malice independent of the intent, or rather attempt, to commit the felony, in order that the crime may come within the particular description to constitute it murder in the first degree. Under the statute the crime must be *murder* at common law, and must be committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or other felony of like character, as I will presently show, in order to its classification in the first degree. Whart. on Hom., 2d Ed., Sec. 56 and Note 3, also sections 57, 58 and 184. That a murder committed in the perpetration or attempt to perpetrate a felony is in the first degree needs neither reason nor adjudicated causes for its support. It is so because made so by statute.

In State v. Jennings, 18 Mo. 435, the 6th instruction given by the trial court, on behalf of the state, is as follows: "If the jury believe from the evidence that it was not the intention of those concerned in lynching Willard to kill him, but that they did intend to do him great bodily harm, and that in so doing death ensued, such killing is murder in the first degree, by the statute of this state." The Supreme Court say: "The sixth instruction is correct under the statute of this state. Homicide committed in the attempt to perpetrate any arson, rape, robbery, burglary, or *other* felony, shall be deemed murder in the first degree. The thirty-eighth section makes the person by whose act or procurement great bodily harm has been received by another, guilty of what is by our law called a felony." This ruling was held correct by the same court in State v. Nueslein, 25 Mo. 121. In State v. Jennings, *supra*, perhaps the printer makes the learned judge use the word "homicide" in the language quoted above, when the word *murder* was intended. However this may be, the proposition is not sustained by the authorities. It should be observed that both Jennings and Nueslein were indicted for willful, deliberate and premeditated murder, and in both cases the learned judge says that a specific intent to kill is not necessary to constitute the crime of murder in the first degree, and for the reason quoted above from the Jennings case. In the case of State v. Jones, 20 Mo. 58, after quoting the first section of the statute, the court say: "The first case reported under the statute of 1835, is the case of Bower v. The State, 5 Mo. Rep. 364. Since this case it has been the practice, in indictments for murder, in order to justify a conviction for the offense in the first degree, to set forth the offense according to its nature and circumstances as required by the statute." In Bower v. State, *supra*, Judge Edwards, in a learned dissenting opinion, says: " * *

* The indictment under this act, for any one of these murders, must charge the particular manner of killing; if by poison it must be so charged; if by lying in wait it must be so charged; if in attempting to perpetrate arson it must be so charged; and so of the other cases specially enumerated." The same rule was recognized in State v. Worrell, 25 Mo. 212.

Referring to the proposition quoted from the Jennings and Nueslein cases, I would further remark that if defendant struck without intent to kill, but with the specific in-

tent to do great bodily harm, which, if inflicted, would have constituted a felony, yet such felony would have been an ingredient in the imputed homicide. The statute evidently intended by the term "any other felony" some felony of like character with arson, rape, robbing and burglary, and other than that which is an ingredient in the imputed murder, otherwise that part of it relating to an attempt to perpetrate a felony would be wholly nugatory. State v. Sloan, 47 Mo. 604; People v. Butler, 3 Park Cr. R. 377; People v. Sheehan, 49 Barb. 217; People v. Rector, 19 Wendell, 605. I conclude that, to constitute murder in the first degree in any of the modes designated in the statute by the general description, viz., "or by any other kind of willful, deliberate and premeditated killing," there must be not only malice and a specific intent to kill, but the killing must be deliberate and premeditated.

But our canvas is not yet clear. We have still remaining murder in the second degree, of which the statute only provides that: "All other kinds of murder at common law not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree," J. H. S.

(*To be continued.*)

OFFICIAL BOND—MASTER IN CHANCERY.

McLAIN ET AL. v. THE PEOPLE.

Supreme Court of Illinois.

[Filed at Springfield, Jan. 31, 1878.

HON. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG, } Associate Justices.

THE rule of law that if a sheriff levies an execution during his first term of office, and sells or collects the money during his second term, the liability is upon his first bond, on the principle that the execution of a writ of *fieri facias* is an entire thing, does not apply to the case of a master in chancery, who, having entered upon the execution of a decree for the sale of lands during his first term of office, does not complete it and collect the money until his second term, and the liability in the latter case is upon his second bond.

PER CURIAM.

Upon a petition for a rehearing in this case, the point is made that the liability of McLain was under his first bond, given as master in chancery, and not under his second bond, the one in suit. The facts under which the question arises are as follows: The order of sale of the lands, made at the March term, 1869, was for the sale of the lands on a credit of nine and eighteen months, purchasers to give notes and personal security, and mortgage on the premises at six per cent. interest. The master in chancery was ordered to make the sale and carry into effect the decree, and directed to bring the money or notes and mortgages into court to be distributed to the persons entitled under the direction of the court. One G. W. Feel, then master in chancery, made sale of lands at public auction, August 12th, 1869, and died shortly after, without doing anything further in the matter. McLain was appointed his successor, Nov. 11th, 1869, and went on and consummated the sale made by Feel, by taking the notes, with personal security, and mortgages from the purchasers, and made a report thereof at the March term, 1870, which was approved by the court. McLain's term of office of two years, having expired, he was re-appointed on the 18th of Nov., 1871, for another term of two years, upon which re-appointment the bond in suit was given. Some time during this, his second term, the money was collected by him. There was no further order of the court in the premises than as in the original decree of sale.

It is said it is the principle that if a sheriff levy an execution during his first term, and sell or collect the money during his second term, the liability is upon his first bond; citing Collier v. Higgins, 1 Dav. Ky. 6; Governor v. Eastwood, 1 Dev. 157; Larned v. Albert, 13 Mass. 295. And it is contended the same rule should apply here—that the master having entered upon the execution of the decree during his first term, it should have been finished by him, and the whole business and liability be considered as done and arising under that term.

There is a difference in the two cases. The sheriff is an officer of the law and executes the process of the court. The master is an officer of the court of chancery, who acts as an assistant to the chancellor and executes the order of the court. It is the settled and well-known doctrine of the common law that he who begins the execution of a writ of *fieri facias* must end it, it being said to be an entire thing. The obligors in a sheriff's bond would enter into it in view of this established and well-known rule of law, and such a liability with regard to a writ of execution in respect to such subsequent matter after the expiration of the term of office, might well be held as embraced within the terms of the bond. But there is no such general and well-known rule of law in relation to sales in general, or to the execution of an order of sale by a court of chancery. None such is referred to, or is pretended to exist, but it is only claimed that the court should adopt it by analogy to the rule in respect to the execution of the writ of *fieri facias*. The sureties then in the master's first bond did not enter into it in view of any such settled and well-known rule of law, and cannot be taken as having assumed any such liability as that rule would impose for wrongful conduct after the expiration of the term of office. By the terms of the bond there is no liability beyond the term of office.

The master was guilty of no misconduct during his first term. To hold the sureties in the first bond liable for such default would be in violation of the well-known rule that the undertaking of a surety is to be strictly construed, that his liabilities are not to be extended by implication beyond the terms of his contract—that he has a right to stand upon its very terms. We do not well see how it could be held that the sureties in the master's first bond could be held liable for this default occurring after the expiration of the term of office in respect of which the bond was given, and it would seem to follow that the liability must be under the second bond. Perceiving no sufficient reason for a rehearing, it is denied.

DICKEY, J., dissenting:

I cannot concur in these views. The master, during his first term, had taken the notes and made the deed, and the notes remained in his hands for collection. Had another been appointed as his successor, and had this master, after the appointment of his successor, collected the money and failed to pay it over, I think the sureties in his bond would have been liable. The fact that he is his own successor does not qualify the liability or alter the case. It is true the liability of a surety cannot be enlarged by implication but is limited to a strict construction of the bond. When a master is charged by the order of the court with the sale of property, and has begun the work, I see no distinction between his powers and duties in relation to such sale and the powers and duties of a sheriff having begun to act under a *fieri facias*. The true construction of the bond is that the master will perform well all duties imposed upon him during his term of office. The duty of completing this sale and collecting the money was imposed during the first term of this office, and not during the second term. No doubt the court has the power by an intervening order to take from the hands of an out-going master business already in his hands and to place it in the hands of his successor. But until this is done, I think it is his duty to finish the business in hand when his successor comes in.

VALIDITY OF CONTRACTS FOR FUTURE DELIVERY—WAGERING CONTRACT.

KINGSBURY *ET AL.* v. KIRWAN.

Superior Court of New York—January Term, 1878.

[Filed March 4, 1878.]

1. CONTRACTS FOR THE FUTURE DELIVERY OF COTTON NOT NECESSARILY WAGERING.—In an action by plaintiffs, a firm of cotton brokers, against the defendant, for losses paid by the plaintiffs for the defendant, arising out of the sale of 1,000 bales of cotton by plaintiffs for the defendant for future delivery, and for the commissions earned in such transaction: *Held*, that, as there was no proof of any intention on the part of the plaintiffs not to deliver, or on the part of the vendees, not to accept the cotton pursuant to the contracts, the contracts were not in contradiction of the statute against betting and gaming; and that such contracts are not objectionable, unless there is evidence to show that the parties to them intended thereby to lay a wager.

2. CLOSING OUT CONTRACTS FOR FAILURE TO KEEP MARGINS GOOD.—When, in such a transaction, the defendant agreed to keep his margins good, and the plaintiffs agreed to carry the contract so long only as defendant's margins were kept good: *Held*, that the plaintiffs had a right, upon the defendant's failure to make his margins good, and after proper notice to him, to close out the contracts and pay the losses arising therefrom, and that they could recover of the defendants the sum so paid, and also their commissions in the transactions; and that the defendant is presumed to know the usages pertaining to the matters as to which he made his agreement.

APPEAL from a judgment entered on a verdict in favor of the plaintiffs, against the defendant, and from an order denying a motion for a new trial on the minutes.

In July and August, 1876, the plaintiffs were cotton brokers, and one of them a member of the Cotton Exchange. During those months, acting as brokers for the defendant, their principal, they sold 1,000 bales of cotton for delivery in the months of September and October, 1876, for a certain price, and received from the defendant certain sums of money or margin, to cover losses if any should arise by increase of the market value of the cotton, as might daily occur from the changes of the market. It was agreed that the defendant's margin should be kept good, and should be paid by him on demand, and that the plaintiffs should continue to act as his brokers and carry the contracts they should make for him only so long as he did so. After these sales made by the plaintiffs for future delivery, the market price of cotton advanced so that if the defendant had bought cotton to cover his sales and made delivery at their maturity, he would have lost the difference between the two prices, and his margin deposited with the plaintiffs to meet such loss would have become exhausted.

The plaintiffs claimed at the trial that when the margins became exhausted they were liable to the other brokers to or through whom the sales were made, by the rules and customs of the exchange, for all such losses, and that they demanded from the defendant the deficiency, and notified him that if he did not respond they would close out the contracts of sale, and that they did so upon his refusal to keep his margins good, and settled the loss with the other parties to the transactions by paying it. The plaintiffs bring this action to recover these margins advanced by them for him, and their commissions.

The defendant claimed that the transactions were void under the statute against gaming and betting, that no actual sales or purchases were made and that no notice of the time, place and manner of closing out was given him. Various exceptions were taken at the trial by the defendant and he also claimed a return of all moneys paid by him to the plaintiffs as margins. There was a verdict for the plaintiffs.

Thomas Bracken for defendant and appellant.
Albert Gallup for plaintiffs and respondents.

CURTIS, C. J., delivered the opinion of the court:

The evidence does not sustain the defendant's claim that these purchases through his brokers of the cotton for future delivery were in contradiction of the statute against gaming and betting. There is no proof of any intention on the part of the plaintiffs not to deliver, or on the part of the vendees not to accept the cotton pursuant to the contracts. Such a contract as the parties to the suit entered into is not objectionable, unless there is evidence to show that that they intended to lay a wager. Tyler *v.* Barrows, 6 Robt., 110; Cassard *v.* Hinman, 1 Bos., 207.

The permission given at the trial by the court to the plaintiffs to amend their complaint by inserting an allegation of due notice to the defendant that he would be closed out if he did not keep his margins good, was a proper exercise of discretion on the part of the court, and warranted by the proofs. Lounsbury v. Purdy, 18 N. Y. 521.

The answer admits in substance that the defendant ordered the sale of the cotton, and agreed that he would keep the margin good as the cotton advanced in the market. If, then, after demand and notice the defendant failed to keep his margin good, the plaintiffs had a right to close the transaction. White v. Smith, 54 N. Y. 522.

There was some conflicting testimony as to the demands for margins and as to the notice, but it was left to the jury to find whether the plaintiffs made the demands and gave the defendant notice of the time and place in which they intended to close out the transaction, and also as to whether the defendant put up the margins when he was notified to put up; and there is no just reason shown for disturbing the conclusion of the jury, which was adverse to the claims of the defendant in these respects, and which was in accordance with the weight of evidence.

The defendant must be presumed to know the usages pertaining to the matters as to which he made his agreement. Walls v. Bailey, 49 N. Y. 472. The usages in respect to cotton brokers and the cotton exchange were in evidence, and also the fact that the defendant had been closed out on a former occasion. He had such previous knowledge of the nature of the business, that he is not in the position of a person of inexperience and ignorant of the meaning of the term "closing out" and the mode in which it is done by going into the market and buying the cotton at the lowest price at the time that it could be bought, and using that in settlement of the contract with the buyer on the principal contract.

The court charged the jury that if the plaintiffs failed to prove to them that due notice was given to the defendant, that then the plaintiffs violated their duty to the defendant, and that he was entitled to recover back the amount of margins he paid with interest.

There are some exceptions to the admissibility of evidence, but they are not well taken. The refusals of the judge to charge as requested by the defendant, are sustained by our views of the law, and by what the testimony at the trial establishes. The same should be said as to those parts of the charge to which the defendant excepts.

The court left it to the jury to determine whether, as the plaintiffs claimed, the margin of $800 was demanded of the defendant on Saturday; also, whether he was told he must furnish that margin on Monday by ten o'clock, and thereupon acquiesced in it, and promised to do so. The jury were properly instructed that if they found such to be the fact, it was a sufficient and reasonable notice, because there was a time to which the defendant agreed and an amount as to which he was notified.

The judgment and order appealed from should be affirmed with costs.

NOTE.—1. An executory contract of sale of goods for future delivery, is not rendered *wagering* by reason of the vendor's not having the goods at the time of entering into the contract, or any expectation of receiving them, otherwise than by purchasing them in the market at or before the time they are required to be delivered under the contract. 2. To make such a contract *wagering*, there must be a *mutual intent and understanding* between the vendor and vendee at the time of entering into it, that there is to be no delivery of the goods, and that the contract is to be settled between them at its maturity by the payment, by one of them to the other, as the market value of the goods may have declined or advanced during the interval, of the difference between the contract and the market price of the goods at the maturity of the contract. 3. It is of the essence of a wagering contract, that there be a reciprocity between the parties thereto as to the chances of winning or losing the sum staked; and hence no contract can be a wager where all the loss or gain under it is to accrue to one only of the parties thereto. The following authorities sustain one or more of these three propositions: Hibblewhite v. McMorine, 5 M. & W. 462; Mortimer v. McCallan, 6 Id. 58; Grizewood v. Blane, 11 C. B. 526; Ashton v. Dakin, 4 Hurlstone & Norman 867; Frost v. Clarkson, 7 Cowen 24; Stanton v. Small, 3 Sandford 230; Cassard v. Hinman, 1 Bosw. 207; McIlvaine v. Egerton, 2 Robert. 422; Tyler v. Barrows, 6 Id. 104; Brua's Appeal, 55 Penn. State 294; Smith v. Bouvier, 70 Id. 325; Kirkpatrick v. Bonsall, 72 Id. 155; Brown v. Speyers, 20 Grattan 296; Rumsey v. Berry, 65 Me. 570; Walcott v. Heath, 78 Ill. 433; Pixley v. Boynton, 79 Id. 351; Logan v. Musick, 81 Id. 415; Carbett v. Underwood, Chicago L. N., Feb'y 17th, 1877; Warren v. Hewitt, 45 Ga. 501; Lehman v. Strasberger, 3 Cent. L. J. 134; s. c., 2 Woods. 554. S. B. J.

CONTRIBUTORY NEGLIGENCE.

HARLAN v. ST. LOUIS, KANSAS CITY AND NORTHERN R. R.*

Supreme Court of Missouri—April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, " WAWICK HOUGH, " E. H. NORTON, " JOHN W. HENRY, } Associate Justices.

1. THE RULE THAT IN A CROWDED CITY, where a railroad company has an intricate combination of tracks, side-tracks and switches in constant use, it will be held to a degree of care commensurate with the danger of the situation, applies also to persons

*This case is reported 6 Cent. L. J. 221; 64 Mo. 480. The opinions, filed on the rehearing and here given, are, for some reason, not contained in the last volume of the Missouri reports.

crossing the track at such places. The increased care required of the company on the one hand and of the public on the other, is, under such circumstances, equal.

2. WHEN THE EVIDENCE TENDS TO PROVE negligence on the part of the defendant, contributing to the damage, or when such negligence is conceded, and there is also undisputed evidence of negligence of the person injured or damaged, it seems it is the duty of the court to determine, as a matter of law, whether such negligence of the injured or damaged person contributed to the injury, and a verdict in such a case is without evidence, and will be set aside on appeal or error. Hicks v. Pacific R. R., 64 Mo. 430, distinguished.

On motion for rehearing.

HENRY, J., delivered the opinion of the court:

The motion for rehearing was based on the following grounds: That the court overlooked material facts in the record, showing the peculiar and complicated circumstances surrounding the killing of Harlan, and in overlooking said facts applied a rule of law not otherwise applicable. Second, that the judgment of the court was in direct conflict with the case of Hicks v. The Pacific R. R. Co., 64 Mo. 430, decided at this term, and with other cases heretofore decided by this court.

The facts which, it is assumed, were overlooked, are that the accident occurred in a crowded city, where the defendant had an intricate combination of tracks, side tracks and switches, almost in constant use, and where the public had a right to expect extraordinary care to prevent accidents. Those facts were not overlooked, and we recognize the the rule that, under the circumstances stated, the company must exercise a degree of care to avoid injuring persons and property commensurate with the danger of the occurrence of such accidents; but it seems that the counsel do not, as we do, recognize a corresponding obligation on the part of the public to exercise care and watchfulness in crossing a railroad track at such a point commensurate with the danger to which persons crossing the track there are exposed. The increased care exacted of the company on the one hand, and of the public on the other, is equal, and leaves the question of liability of the company to an adult person of sound mind, in the enjoyment of the senses of sight and hearing, dependent upon the rules applicable, if the accident had occurred at any other point on the road. The evidence that the deceased was guilty of negligence contributing directly to cause his death is uncontradicted. The undisputed facts constitute direct contributory negligence,

The case at bar is not like that of Hicks v. The Pac. R. R. Co., with which counsel think the judgment herein is in conflict. The defense in that case was that Hicks was a trespasser, and that, therefore, the company owed no duty to him. We held otherwise, and that whether a trespasser or not made no difference, if by the exercise of ordinary care the defendant could have avoided injuring him. There was evidence that he was guilty of negligence contributing directly to produce the injury; but there was also evidence to the contrary. There was also a conflict of evidence as to the negligence of the defendant; but those issues, on proper instructions, were submitted to the jury, and if this court had reversed the judgment, it could have been on no other ground than that the verdict was against the weight of evidence. In the case we are considering, the judgment was not reversed because the verdict was against the weight of evidence, but because there was no evidence to support it.

But counsel insist that, aside from Harlan's want of care, the question still remained whether the company could have prevented the accident by the observance of due care, as well as what amounted to due care under the circumstances, and that three propositions are necessarily submitted to the jury in this class of cases, viz: First. Was the defendant guilty of negligence? Second. Was the plaintiff guilty of negligence contributing directly to the result? Third, Notwithstanding plaintiff's negligence, could the defendant, by the exercise of ordinary care, have prevented the result?

It must be borne in mind that the negligence for which the company is liable is that which directly contributes to produce the injury. The fact that the company has been guilty of negligence followed by an injury does not make the company liable, unless the injury were occasioned by that negligence. The connection of cause and effect must be established. For instance, a passing train by an accident, the result of negligence on the part of the company, is compelled to reverse its engine and run backwards, and in so doing runs over a person crossing the track. The negligence of the company made it necessary to back the train; yet unless guilty of negligence in running the train backwards, the company would not be held liable for the injury.

But, if after discovering the danger in which the party had placed himself, even by his own negligence, the company could have avoided the injury by the exercise of reasonable care, the exercise of that care becomes a duty, for the neglect of which the company is liable. When it is said, in cases where plaintiff has been guilty of contributory negligence, that the company is liable, if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable, if by the exercise of reasonable care *after a discovery by defendant of the danger in which the injured* party stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity. So that the first and second propositions which counsel insist should be submitted to the jury in this class of cases require modification, as above suggested. The evidence that Harlan's negligence contributed directly to produce the injury was clear and uncontradicted, and there was no evidence whatever tending to show that, after the deceased got on the track, it was even *possible* to prevent the accident.

There was no issue to submit to a jury under the evidence as preserved in the bill of exceptions. The judgment of the court is in harmony with Hicks v. The Pacific R. R. Co, Evans v. The

Pacific R. R. Co., 62 Mo. 49, and Fletcher v. The St. L., K. C. & N. R. R. Co., decided at the present term. The record and authorities cited, and others not cited, have been examined carefully by every member of the court, and all concur in overruling the motion for a new hearing.

HOUGH, J., concurring:

I concur in overruling the motion for a rehearing. It may be conceded that the defendant was guilty of negligence in failing to ring the bell. But the undisputed testimony in the cause shows that the acts of the deceased directly contributing to produce his death amounted to negligence *per se*. The case standing thus it is clear that the plaintiff would not have been entitled to recover, as a matter of law. Now, if there had been any testimony tending to show that the defendant could, by the exercise of proper care, after discovering the danger to which the deceased was exposed, have avoided injuring him, then the verdict should be permitted to stand. There was not only no such testimony, but there was testimony to the contrary, and it was therefore properly held, not that the verdict was against the weight of evidence, but that there was no evidence whatever to support the verdict. That this court will interfere in such cases has been repeatedly decided.

EXPERT TESTIMONY.

BUCHMAN v. THE STATE.

Supreme Court of Indiana—November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.
" SAMUEL E. PERKINS, }
" WILLIAM E. NIBLACK, } Associate Justices.
" JAMES L. WORDEN, }
" GEORGE V. HOWK, }

PHYSICIANS and surgeons can not be compelled to give professional opinions, as experts, in courts of justice, without receiving extra pay for such services, beyond the ordinary witness fees; and upon refusal so to testify, they can not be committed for contempt. Whether this rule applies to all classes of experts —*quaere*.

One Hamilton was on trial on an indictment for rape. On the trial he put upon the stand, as a witness, the defendant, Dr. Buchman, who testified, upon questions propounded to him, that he was a practicing physician, and had followed that profession for seven years. Being asked whether or not, in female menstruation, there is, sometimes, a partial retention of the menses after the main flow has ceased, he refused to answer unless reasonably compensated before testifying as a medical expert. He refused to answer another question, saying that this answer would depend upon his professional knowledge of the subject, and he would not give it without being paid. Being asked to whom he looked for pay, he replied that he expected the party calling him to pay him, or that the court would provide for his compensation.

The court being of opinion that the witness was required by law to answer the questions without compensation other than the ordinary witness fee, and the witness persisting in his refusal to answer, he was committed as for contempt. From the commitment the witness appealed to this court.

WORDEN, J., delivered the opinion of the court:

The question presented, being a novel one in Indiana, so far as we are advised, and an important one, we have bestowed such time and care upon its consideration as its importance seemed to require.

It must be and is conceded that a physician or surgeon, when called upon, must attend and testify to facts within his knowledge, for the same compensation, in the way of fees, as any other witness. In respect to facts within his knowledge, he stands upon an equality, in reference to compensation, with all other witnesses. But the question presented is whether he can be compelled to give a professional opinion without compensation other than the ordinary fees of witnesses.

In England, there is some diversity in the decisions in respect to the question whether an attorney or medical man is entitled to higher compensation for attendance as a witness than ordinary witnesses. This diversity, however, relates to witnesses required to testify to facts, and not to give professional opinions. In respect to professional opinions, we are not aware of any diversity of decision. In note 2 to sec. 310, 1 Greenl. Ev., 13 ed., it is said: "An additional compensation for loss of time was formerly allowed to medical men and attorneys, but this rule is now exploded. But a reasonable compensation paid to a foreign witness, who refused to come without it, and whose attendance was essential in the cause, will, in general, be allowed and taxed against the losing party. See Lonergan v. The Royal Exchange Assurance, 7 Bing. 725; s. c., id. 729; Collins v. Godefroy, 1 B. & Ad. 950. There is also a distinction between a witness of facts and a witness selected by a party to give his opinion on a subject with which he is peculiarly conversant from his employment in life. The former is bound as a matter of public duty to testify to facts within his knowledge. The latter is under no such obligation, and the party who selects him must pay him for his time before he will be compelled to testify. Webb v. Paige, 1 Car. & Kir. 23." The case of Lonergan v. The Royal Assurance, referred to in the above note, was not the case of a witness called to give a professional opinion, but the witness was a foreign sea captain, without whose presence the plaintiff's attorney "deemed it unsafe to trust the trial of the cause to written depositions, so long as he could prevail on the captain to remain in England to give his evidence personally on the trial before the jury; inasmuch as the demeanor and manner of Captain Moffatt's giving his evidence before the jury might have great weight with the jury, in addition to his intelligent and gentlemanly appearance." Tindal, C. J., said, amongst other things: "But the general rule has been that when witnesses attend under a subpœna, none receive any allowance for loss of time, except medical men and attorneys. If that rule were to undergo revision, I can not

say that it would stand the test of examination. There is no reason for assuming that the time of medical men and attorneys is more valuable than that of others whose livelihood depends on their own exertions. But that rule is not applicable to the case of a foreign witness, who may refuse to attend if the terms he proposes are not acceded to. If he asks only what is reasonable, I can not see why it should not be allowed, and be charged to the unsuccessful party."

The case which is supposed to have exploded the rule that attorneys and medical men are to have additional compensation for loss of time, is that of Collins v. Godefroy, cited in the above note. In that case Collins sued Godefroy, to recover a remuneration for plaintiff's loss of time, in attending as a witness, under a subpoena issued by Godefroy, in a case in which Godefroy was a party. The plaintiff attended six days as a witness, but was not called upon to give his evidence. Lord Tenterden, C. J., said: "If it be a duty imposed by law upon a party regularly subpœnaed to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration. We think such a duty is imposed by law, and on consideration of the statute of Elizabeth, and of the cases which have been decided on the subject, we are all of the opinion that a party can not maintain an action for compensation for loss of time in attending a trial as a witness. We are aware of the practice which has prevailed in certain cases of allowing as costs between party and party so much per day for the attendance of professional men, but that practice can not alter the law. What the effect of our decision may be is not for our consideration. We think on principle that an action does not lie for a compensation to a witness for loss of time in attendance under a subpœna."

But, notwithstanding the case above noticed, the rule allowing professional men additional compensation, was followed in England as late as 1862. In the case of Parkinson v. Atkinson, 31 L. J. N. S. 199, the master had allowed the expenses of an attorney who was called as a witness, but did not give professional evidence, on the higher scale allowed to professional witnesses. On motion for a rule to show cause why the taxation should not be reviewed, Earle, C. J., said: "We do not approve of the rule which is said to prevail in criminal cases, that if a surgeon is called to give evidence not of a professional character, he is only to have the expenses of an ordinary witness. We think the master was quite right in allowing the expenses of this witness on the higher scale." So, also, in the case of Turner v. Turner, Jurist, 1859, p. 839, the master allowed one Marcus Turner, a barrister, of London, one pound and a shilling a day for attendance as a witness. The Vice-Chancellor said: "The right of a professional man to one pound and a shilling per day was founded on the fact of his being abstracted from his functions. It was unnecessary to say what classes came within the definition 'professional man,' but there was no doubt that a barrister did, and if subpœnaed as a witness, he had a right to receive the remuneration, small or scanty, as it was." The motion to vary the taxation was overruled.

The foregoing cases, however, do not decide the point involved here, and they have been noticed rather with a view of showing that they are not in conflict with the right claimed by the appellant than as establishing that right. We come now to authorities more directly in point.

The case of Webb v. Paige, cited in the above note from Greenl. Ev., decided in 1843, was an action for negligence in carrying goods. A witness was called for the plaintiff to speak of the damage sustained by the goods, consisting of cabinet work, and the expense that would be necessary to restore or replace the injured articles. The witness demanded compensation, and Maule, J., in deciding the point, used the language set out in the latter part of the note above cited from Greenleaf. The witness, upon receiving an undertaking for his pay, was examined. This is the only English case that bears directly upon the point, of which we have any knowledge. The American cases are not numerous, and we proceed to notice such as there are.

In the matter of Roelker, Sprague, 276, during a trial upon an indictment, the district-attorney moved for a capias to bring in a witness, who had been subpœnaed to testify as an interpreter. But Sprague, J., said: "A similar question had heretofore arisen as to experts, and he had declined to issue process to arrest in such cases. When a person has knowledge of any fact pertinent to an issue to be tried, he may be compelled to attend as a witness. But to compel a person to attend because he is accomplished in a particular science, art or profession, would subject the same individual to be called upon in every case in which any question in his department of knowledge is to be solved. Thus the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the district, and give his opinion in every trial in which a medical question should arise. This is so unreasonable that nothing but necessity can justify it. The case of an interpreter is analagous to that of an expert. It is not necessary to say what the court would do if it appeared that no other interpreter could be obtained by reasonable effort. Such a case is not made as the foundation of the motion. It is well known that there are in Boston many native Germans and others skilled in both the German and English languages, some of whom, it may be presumed, might without difficulty be induced to attend for an adequate compensation."

In the case of The People v. Montgomery, 13 Abb. Prac. Rep. (N. S.) 207, Montgomery was indicted for murder. The district-attorney had procured the attendance of Dr. Hammond as a witness to testify professionally in the case, who was paid, or was to be paid, the sum of $500, for his attendance and services as such witness. This was complained of as an irregularity. The court said, E. D. Smith, P. J., delivering the opinion: "We do not see that the calling of Dr. Hammond

as a witness and the payment to him of a sufficient sum to secure his attendance at the court during the trial, was in any respect an irregularity, or did any wrong to the prisoner. It seems to us that the district-attorney was acting in the line of his duty as public prosecutor in securing the attendance of a proper medical witness of high repute to meet the distinguished medical experts, which he knew the prisoner expected to call on his side. * * * The district-attorney, it is true, might have required the attendance of Dr. Hammond on subpœna, but that would not have sufficed to qualify him to testify as an expert with clearness and certainty upon the questions involved. He would have met the requirements of the subpœna if he had appeared in court when he was required to testify and give proper impromptu answers to such questions as might then have been put to him in behalf of the People. He could not have been required, under process of subpœna, to examine the case, and to *have used his skill and knowledge to enable him to give an opinion upon any points of the case*, nor to have attended during the whole trial and attentively considered and carefully heard all the testimony given on both sides, in order to qualify him to give a deliberate opinion upon such testimony, as an expert, in respect to the question of the sanity of the prisoner. Professional witnesses, I suppose, are more or less paid for their time, services and expenses, when called as experts in important cases, in all parts of the country."

These cases go far to establish the position contended for by the appellant. But, on the other hand, the case of *ex parte* Dement, decided by the Supreme Court of Alabama, and reported in 6 Cent. L. J., 11, decides that a physician or surgeon may be compelled to testify as an expert, where the testimony is relevant to a cause pending before a judicial tribunal, without being paid as for a professional opinion.

Having thus considered the cases that have come under our notice bearing on the subject, it may be well to look at the works of text writers, for they furnish at least some evidence of what the law is. In 1 Taylor's Med. Jur., p. 19, it is said: "Before being sworn to deliver his evidence, a medical or scientific witness may claim the payment of his customary fees, unless an arrangement has already been made between him and the solicitors who have sent him a subpœna. These fees are generally made matter of private arrangement between the witness and the attorney." This clearly implies that he is to be paid his customary fees for an opinion, and that he may demand payment before delivering his evidence. But we doubt whether he could make the demand before being sworn, for he might be called upon to prove some fact within his knowledge.

In The Jurisprudence of Medicine in its Relations to the Law of Contracts, Torts and Evidence, by John Ordroneaux, secs. 114, 115, it is said: "But once put upon the stand as a skilled witness, his (the physician's) obligation to the public now ceases, and he stands in the position of any professional man consulted in relation to a subject on which his opinion is sought. It is evident that the skill and professional experience of a man are so far his individual capital and property, that he can not be compelled to bestow it gratuitously upon any party. Neither the public, any more than any private person, have a right to extort services from him in the line of his profession without adequate compensation. On the witness-stand, precisely as in his office, his opinions may be given or withheld at pleasure, for a skilled witness can not be compelled to give an opinion, nor be committed for contempt if he refuses to do so. * * * As the result of the foregoing conclusions, it may be said that a witness who is called in an action to depose to a matter of opinion, depending on his skill in a particular trade, has, before he is examined, a right to demand from the party calling him a compensation for his services; for there is a wide distinction between a witness thus called and a witness who is called to depose to facts which he saw." Then follow the remarks of Maule, J., in the case of Webb v. Paige, which have already appeared in this opinion.

In 2 Phil. Ev., 4 Am. Ed., p. 828, it is said: "With respect to compensation for loss of time, the general rule is that it ought not to be allowed; though some compensation has usually been allowed to medical men and attorneys, but not others. And there seems to be a reasonable distinction between the case of a witness called to depose to a fact, and one who is called to speak to a matter of opinion, depending on his skill in a particular profession or trade; the former is bound, as a matter of public duty, to speak to the fact which has occurred within his knowledge, but the latter is under no such obligation, and is selected by the party to give his opinion merely, and he is entitled, therefore, to demand a compensation for loss of time."

In 1 Redf. on Wills, note 44 to pl. 31, p. 154-5, the author says: "The following propositions may be of interest: 1. It is clear that experts are not obliged to give testimony upon mere *speculative* grounds, and where they have no personal knowledge of the *facts* in the case. If they have had personal knowledge of the testator, it may fairly be regarded as amounting to the knowledge of facts. But unless this is the case, a medical witness is not obliged to obey the ordinary witness subpœna, and will not be held in contempt for disobeying it. This has been so ruled at *nisi prius* in England within the last few years. 2. The expert is not obliged to examine books and precedents, with a view to qualify himself to give testimony; nor is he obliged to examine into the facts of cases by personal inspection of individuals, whose state may be the subject of controversy in the courts. 3. It being purely matter of conventional arrangement between professional experts and those who desire to employ them as witnesses, both in regard to their acting as such, and also their making preparation to enable them to give such testimony, it virtually places a price upon such testimony in the market, and its price is likely to range somewhat according to its ability to aid one or the other of the parties litigant. The tendency of this is to

make it partisan and one-sided, as a general thing."

Judge Redfield in no manner dissents from the above propositions as legal ones, but suggests, not that experts are not entitled to be paid, but that the law should be so changed "that this class of witnesses should be selected by the court, and that this should be done wholly independent of any nomination, recommendation or interference of the parties, as much so, to all intents, as are the jurors. To this end, therefore, the compensation of scientific experts should be fixed by statute, or by the court, and paid out of the public treasury, and either charged to the expense of the trial, as part of the costs of the cause, or not, as the legislature should deem the wisest policy." Iowa has legislated upon the subject, so that the court is to fix the compensation with reference to the time employed, and the degree of learning or skill required. Snyder v. Iowa City, 40 Iowa, 646.

These elementary authorities, and the cases of Webb v. Paige, and In the Matter of Roelker, *supra*, clearly and unmistakably point to the conclusion that the appellant was not bound to give his professional opinion without having been paid therefor. It would seem on general principles that the knowledge and learning of a physician should be regarded as his property which ought not to be extorted from him in the form of opinions without just compensation. As it was said by this court of an attorney in the case of Webb v. Baird, 6 Ind. 13: "To the attorney, his profession is the means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens. * * * The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights."

In Israel v, The State, 8 Ind. 467, it was held that the services of witnesses, in criminal cases, were not "particular services," within the meaning of the constitution. This is conceded. Witnesses who know anything of a case, however high or low, rich or poor, learned or unlearned they may be, or whether occupying public or private stations in life, all stand upon an equality in this respect and must attend as witnesses without other compensation than that provided by law. This is a burden that falls upon all alike. The witnesses are bound to attend, and, in the language of some of the authorities before cited, "speak to the facts which have occurred within their knowledge." But the case decides nothing upon the point here involved. The case of Blythe v. The State, 4 Ind. 525, however, is exactly in point in principle. There Blythe, an attorney of the court, was appointed to defend a pauper on the charge of a larceny. Blythe denied the right of the court to demand his professional services without compensation and refused to act. For this refusal the court adjudged him guilty of contempt. This court held, under the provision of the constitution above set out, that he was not bound to perform the service.

In Webb v. Baird, 6 Ind. 13, Baird had been appointed to defend a pauper on a criminal charge and had performed the service, and the question involved was whether he was entitled to compensation from the county. Judge Stuart said in delivering the opinion of the court, that "the law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizen s."

Buf if the professional services of a lawyer cannot be required in a civil or criminal case without compensation, how can the professional services of a physician be thus required? Is not his medical knowledge his capital stock? Are his professional services more at the mercy of the public than the services of a lawyer? When a physician testifies as an expert by giving his opinion, he is performing a strictly professional service. To be sure he performs that service under the sanction of an oath. So does the lawyer when he performs any service in a cause. The position of a medical witness testifying as an expert, is much more like that of a lawyer than that of an ordinary witness testifying to facts. The purpose of this service is not to prove facts in the cause, but to aid the court or jury in arriving at a proper conclusion from facts otherwise proved. Is not this also the province and business of an attorney? And are not the services of each equally "particular?" All attempts to make a difference in the two cases are but losing sight of the substance and grasping at the shadow.

If physicians and surgeons can be compelled to render professional services by giving their opinions on the trial of criminal cases without compensation, then an eminent physician or surgeon may be compelled to go to any part of the state, at any and all times, to render such services without other compensation than such as he may recover as ordinary witness fees from the defendant in the prosecution, depending upon his conviction and ability to pay. This, under the general principles of law and the constitution of the state, he can not be compelled to do. If he knew facts pertinent to the case to be tried, he must attend and testify as any other witness. In respect to facts within his knowledge, his qualifications as a physician or surgeon are entirely unimportant. In respect to facts, as before stated, he stands upon an equality with all other witnesses; and the law, as well as his duty to the public, requires him to attend and testify for such fees as the legislature have provided. Not so, however, in respect to his professional opinions. In giving them he is per-

forming a "particular" service, which can not be demanded of him without compensation. The 13th section of the bill of rights, provides that in all criminal prosecutions, the accused shall have the right to have compulsory process for obtaining witnesses in his favor. This provision has no bearing upon the question involved. The term "witness," as thus used, was used in its ordinary sense as embracing those who know, or are supposed to know some fact or facts pertinent to the cause. But the physician or surgeon, when giving his professional opinion in a court, does not, as above stated, occupy the position of a witness, testifying to facts. He performs the service under oath, to be sure, and this is the only circumstance from which he can be called a witness at all. So the judge upon the bench, the lawyer at the bar and the jury in the jury box, all perform their service under oath.

It is unnecessary to determine, in this case, whether all classes of experts can require payment before giving their opinions as such. It is sufficient to say that physicians and surgeons, whose opinions are valuable to them as a source of their income and livelihood, can not be compelled to perform service by giving such opinions in a court of justice without such payment. The commitment of appellant for contempt was erroneous and the judgment of the court below is reversed.

NOTE.—Biddle, C. J., and Niblack, J., dissent from the foregoing opinion, on grounds stated by Biddle, C. J., in the case of Dills v. The State.

DIGEST OF DECISIONS OF SUPREME COURT OF THE UNITED STATES.

October Term, 1877.

BANKRUPT ACT—MEANING OF "FRAUD."—The word "fraud," as used in the 33d section of the Bankrupt Act, means *actual* and not *constructive* fraud. N. purchased notes belonging to an estate from the executor at a discount and under circumstances that rendered him guilty of constructive fraud: *Held*, that the fraud was not such as to preclude him from setting up his discharge in bankruptcy against a suit to recover the value of the notes. *Neal v. Scruggs.*—In error to the Supreme Court of Appeals of Virginia. Opinion by Mr. Justice HARLAN. Judgment reversed.

EVIDENCE—TESTIMONY OF EXPERTS.—In an action to recover damages for the loss of a barge which the defendants undertook to tow from Jersey City to New Haven, through Long Island Sound, a witness was asked: "With your experience, would it be safe or prudent for a tug-boat on Chesapeake bay or any other wide water to tug three boats abreast with a high wind?" The witness had testified that for many years he had been the captain of a tug-boat and was familiar with the making up of tows; that he was a pilot and had towed vessels on Long Island sound, although he was not familiar with the sound, but that he was familiar with the waters of the Chesapeake bay. *Held* proper. The witness was an expert and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class which cannot be put to ordinary witnesses. It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury. As an expert he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases. It is competent upon the question of the value of land, Clark v. Baird, 9 N. Y. 183; Bears v. Copely, 10 N. Y. 93; or as to the value of a particular breed of horses, Harris v. Panama R. R. Co., 4 Jones & Spencer, 373; or upon the value of the professional services of a lawyer, Jackson v. N. Y. C. R. R. Co., 2 Sup. Ct. Rep. 653; or on the question of negligence in moving a vessel, Moore v. Westcoult, 9 Bosw. 558; or on the necessity of a jettison, Price v. Hartshorn, 44 N. Y. 94. In Walsh v. Washington Marine Ins. Co., 32 N. Y. 427, it was decided that the testimony of experienced navigators on questions involving nautical skill was admissible. The witness in that case was asked to what cause the loss of the vessel was attributable, which was the point to be decided by the jury. The court sustained the admission of the evidence, using this language: "We entertain no doubt that those who are accustomed to the responsibility of command, and whose lives are spent on the ocean, are qualified as experts to prove the practical effect of cross-seas and heavy swells, shifting winds and sudden squalls." The books give a great variety of cases in which evidence of this character is admissible.—*Eastern Transportation Line v. Hope.* In error to the Circuit Court of the United States for the Eastern District of Pennsylvania. Opinion by Mr. Justice HUNT. Judgment affirmed.

SOME RECENT ENGLISH DECISIONS.

AGREEMENT FOR LEASE—STIPULATION FOR FORMAL CONTRACT—STATUTE OF FRAUDS—SPECIFIC PERFORMANCE.—*Winn v. Bull.* High Court, Chy. Div. 26, W. R. 230. An agreement for a lease signed by the parties, but expressed to be "subject to the preparation and approval of a formal contract," is not a final agreement, and is not binding within the statute of frauds, so that specific performance can be enforced thereof.

AGREEMENT FOR LEASE—OFFER AND ACCEPTANCE—STATUTE OF FRAUDS—LESSOR NOT NAMED.—*Williams v. Jordan*, High Court, Chy. Div., 26 W. R. 230. Defendants signed an offer in writing to take a lease of plaintiff's theatre, which was attested by his agent, but was addressed to him as "Sir," and did not name him as the lessor. The agent sent a written acceptance to the defendants, which also did not name the lessor. This acceptance was not signed by the lessees nor referred to in any other document. *Held*, that there was no written agreement within the statute of frauds so as to entitle the plaintiff to specific performance.

DAMAGE TO PIER BY ABANDONED SHIP—LIABILITY OF OWNER—ACT OF GOD.—*River Wear Commr's v. Adamson.* House of Lords, 26 W. R. 217. By the Harbors, Docks, and Piers Clauses Act, 1847, 10 Vict. c. 27, § 74, which was incorporated with the private act of the plaintiffs, "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbor, dock, or pier, or the quays or wharves connected therewith; and the master or person having the charge of such vessel or float of timber through whose willful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any vessel or float of timber until sufficient security has been given for the damage done by the same; provi-

ded always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound to employ or put his vessel in charge of." A ship belonging to the defendants, which had been wrecked in a storm and afterwards abandoned by the crew, was driven by force of the waves against the plaintiffs' pier, causing considerable damage thereto. *Held*, (Lord Gordon dissenting), that the defendants were not liable to the plaintiffs for damage done to the pier. Judgment of the court of appeals, reported 24 W. R. 872, L. R. 1 Q. B. D. 546, affirmed. Dennis v. Tovell, 21 W R. 170, L. R. 8 Q. B. 10, distinguished.

A COURT WILL NOT GRANT A WRIT OF MANDAMUS WHERE THERE IS NO POWER OF ENFORCING OBEDIENCE TO IT.—*In re Bristol & North Somerset R. R.* High Court, Chy. Div. 26 W. R. 236. This was a rule for a *mandamus* to compel the Bristol and North Somerset Railway Company to execute an order made by the Board of Trade, under powers conferred on them by 26 and 27 Vict. ch. 92, § 7, on August 25, 1875, requiring the company to make a bridge over their line at Radstock instead of a level crossing. It appeared from the affidavits that the company had got into financial difficulties, and had leased their line in perpetuity to the Great Western Railway Company, under agreements confirmed by act of Parliament. The latter company work the line, and the Bristol and North Somerset Company are virtually extinct, and, therefore, they had no power, or funds, or means of raising funds, to comply with the order of the Board of Trade. COCKBURN, C. J.: I am of opinion that this rule should be discharged. It is clear that the compulsory powers of the company to take land have expired, and it is also clear that the company, to comply with the order of the Board of Trade, would have to take fresh land; and I do not see any way in which they could do so except by compulsion. It is idle to make the rule absolute, if in the end there is no power of compelling and enforcing obedience to it. The company in question is defunct, their powers of raising money gone, their capital spent, and they have parted with their railway to the Great Western Railway Company for the simple reason that they had no funds to go on with; under these circumstances, if a *mandamus* was issued, how could it be enforced? The court would not put the directors in jail for the purpose of enforcing an order which it is not in their power to execute. I regret that the machinery put in motion should fail. The Great Western Company have taken the management, and are in possession of the property of the Bristol and North Somerset; they take the benefits, but the legislature has not been vigilant enough to fix on them the liabilities. MELLOR, J.: I am of the opinion, and agree with the Lord Chief Justice, that it is idle to issue a writ of *mandamus* when it is impossible to enforce the performance of what is ordered.

NOTES OF RECENT DECISIONS.

CONTRIBUTORY NEGLIGENCE—PARTY ACTING UNDER THE DIRECTION OF COMPANY'S SERVANT NOT GUILTY OF. — *Alleghany Valley R. R. v. Findley.* Supreme Court of Pennsylvania, 4 W. N. 438. Opinion PER CURIAM. F called with his team at defendant's depot for freight. The company's agent directed him to a position at the station within a few feet of the track, informing him that no train would pass for half an hour. A train came within five minutes, and one of his horses was injured. *Held*, that he was not guilty of contributory negligence.

TROVER— WHEN MAINTAINABLE BETWEEN JOINT OWNERS—DESTRUCTION OF PROPERTY BY ONE JOINT OWNER.—*Given v. Kelly.* Supreme Court of Pennsylvania, 4 W. N. 433. Opinion by MERCUR, J. 1. The rule that one joint owner of a chattel can not maintain trover against his co-owner for the detention of possession or sale of the property, is restricted to cases in which the property remains *in specie*. If the property be destroyed, or be so dismembered as to be rendered unfit for the purpose for which it was designed, trover by a joint owner will lie. 2. The defendant, being a joint owner with plaintiffs of the machinery and "rig" of an oil well, and being in sole actual possession thereof, abandoned the well, dismantled the engine and machinery, sold the boiler, and removed the tubing and remainder of the rig out of the county: *Held*, that such action was a virtual destruction of the property, by reason whereof his co-owners could maintain trover against him.

RAILROAD CORPORATIONS — EMINENT DOMAIN— TRESPASS—AUTHORITY OF AGENT WHEN A QUESTION FOR A JURY.—*Bean v. Howe.* Supreme Court of Pennsylvania, 5 W. N. 5. Opinion by WOODWARD, J. A railroad company having occupied a portion of a public highway, and having taken away a bridge, neglected to replace the bridge. The road commissioners undertook the work, and let the contract to a contractor who entered upon the railroad company's ground. There was evidence of assent to the location by the railroad company's superintendent, who, however, denied both his assent and authority to assent. When the bridge was nearly completed, employees of the railroad company drove the contractor from his work and tore up the bridge. In an act of trespass by the contractor, the court instructed the jury to find a verdict for defendants, on the ground that the plaintiff had no authority to enter on the company's premises. *Held* (reversing the judgment of the court below) that the question of the scope of the superintendent's authority, and of his agreement, was for the jury. *Held further*, that if the superintendent's authority and agreement had been proved, the plaintiff would have been entitled to recover.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

November Term, 1877.

[Filed February 26, 1878.]

HON. EDWARD A. LEWIS, Presiding Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

HUSBAND AND WIFE.— While a husband has not recognized his wife as his agent, or ratified any act of hers in any similar transaction, he will not be liable for goods purchased by her without his authority for the purpose of furnishing her father's house, and the fact that on a previous occasion she had purchased goods at the same store for the same purpose, which were charged to the husband, and for which he paid, will not make him liable, if he was himself present with his wife at the time of the former purchase. Reversed and judgment for defendant. Opinion by BAKEWELL, J.—*Bray v. Beard.*

FRAUDULENT SALE— REPLEVIN—CLAIMANT NEED NOT BE ABSOLUTE OWNER.—1. A fraudulent sale is voidable; but the right to nullify it resides solely with the party defrauded. A party to an executed contract fraudulent as to third parties only can not set it aside. 2. The claimant in replevin need not be absolute owner. If he have a special property in the goods, or an interest in them of a temporary and limited nature it is enough, if he has had actual possession and has been deprived of the possession by defendant. Affirmed. Opinion by BAKEWELL, J.—*Hazard v. Hall.*

ATTACHMENT—PLEA—ISSUE.—1. In attachment for rent before a justice, where defendant in the plea in abatement denies that he is moving his property, it will be intended that he denies that he is so moving it as to furnish ground for attachment, and the plea in abatement is not bad, because it does not expressly traverse the allegation that the landlord is in danger of losing his rent. 2. The question in an attachment for rent is, not whether the tenant is moving his property, but whether he is moving it so as not to leave enough to secure the landlord. The tenant is not liable in attachment simply because he is selling part of his crop. Affirmed. Opinion by BAKEWELL, J. — *Meier v. Thomas.*

BANK—DEPOSITOR—AGENCY.—1. The relations between a bank and its current depositor are those of debtor and creditor. When payment upon a discount to a depositor, creates an indebtedness on his part, all the funds which the bank has to his credit may be applied on such indebtedness until it is full paid. 2. L deposited at the bank of which he was a customer a draft for discount, and received credit for the proceeds. At the maturity of the draft it was dishonored, and the bank charged L with the amount of the draft, and transmitted the same to him with notice of its action. At the time of the dishonor of the bill, L had on deposit at the bank more than enough to meet the bill. The bill was at once returned to the bank by L, with a request to the bank to sue upon the draft in its own name, whereupon the bank credited L by the bill, and at once instituted suit against the other parties to the paper. *Held*, that the bank received the draft after maturity, or else was the agent of L, and, in either case, the acceptor was entitled, in a suit by the bank against him on the note, to an inquiry into the consideration as between themselves and the payee. Reversed and remanded. Opinion by LEWIS, P. J.—*Union Bank of Quincy v. Tutt.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS,
} Associate Justices.

MARRIED WOMEN—ENFORCEMENT OF LIEN ON SEPARATE PROPERTY.—A complaint to enforce a lien against the separate real estate of a married woman, for an indebtedness contracted by her for its improvement, must show that she intended and agreed to charge the indebtedness upon her separate real estate; and the fact that she contracted for such improvements, and caused them to be placed upon her separate real estate, will not raise the implication that she intended to charge her estate with the indebtedness. Her coverture disables her from making an ordinary contract for improving her separate real estate, and unless by such contract she agreed that her separate real estate shall be bound to answer for the indebtedness, the agreement can not be enforced. 53 Ind. 54. Opinion by BIDDLE, C. J.—*Dame et al. v. Canomff.*

MARRIED WOMEN'S SEPARATE ESTATE — HOW CHARGED.—Contracts of married women possessing separate property may be divided into three classes: 1. General contracts not concerning their separate property, and not expressing an intention of charging the same. 2. Such contracts as pertain to, and concern their separate estate. 3. Contracts not concerning their separate estate, but in which they express an intention of charging the same upon their separate estates. Contracts of the first class are void, or, at least, voidable. Contracts of the second class are valid, and may be enforced against the separate property in relation to which they are made and performed. Contracts of the third class are valid, and payment of them may be enforced out of the income of their separate estates, and perhaps, if necessary, out of the estates themselves. 20 Ind., 54. Where the contract in question was a note given for a piano, and was in the following words:

"$200. FOWLER, IND., December 10, 1874.

One year after date, I promise to pay to the order of E. D. Richards, out of my own separate property, two hundred dollars. MARY O'BRIEN."

Held: The intention of the maker to charge the debt upon her separate estate was sufficiently manifested, and the court might properly order it to be paid out of the income thereof. Opinion by PERKINS, J.—*Richards v. O'Brien.*

RESULTING TRUSTS—HUSBAND AND WIFE.—A recovered a judgment against B, who afterwards purchased a piece of real estate, with the understanding that the conveyance should be made to his wife. No money was paid at the time of purchase, but the purchase money was secured by mortgage. By mistake the deed was made to B instead of to his wife. The wife afterwards paid one installment of the purchase money. A then levied on the land to satisfy his judgment. *Held*, that no trust in the land was created in writing in favor of the wife and none could arise by implication of law before the payment of the purchase money. A's judgment being in existence before the land was purchased by B, and no money having been paid by the wife until after the land was purchased, no trust could arise in her favor which could disturb the lien of A's judgment. Opinion by BIDDLE, C, J.—*Burket v. Burket.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT,
" OTIS P. LORD,
" AUGUSTUS L. SOULE,
} Associate Justices.

NEGLIGENCE—ESTRAYS.—1. If, in an action of tort to recover the value of a horse killed upon the defendant's railway, it appears that the horse was at the time of the accident, an estray trespassing on the railroad, the defendants are not liable unless guilty of reckless carelessness or wanton misconduct. Fitchburg Ins. Co. v. Davis, 121 Mass. 118. 2. But if the plaintiff was guilty of no negligence in allowing the horse to escape, the defendants will be liable, if the injury was caused by their neglect to maintain proper gates; and whether the plaintiff was negligent in suffering the escape is a question of fact for the jury. Opinion by NORTON, J.—*Towner v. Nashville and Lowell R. R. Co.*

LEGACIES AND DEVISES—GENERAL FOLLOWED BY PARTICULAR DESCRIPTION.—1. The bequest of the interest of the testator, which he holds as mortgagee, in real estate, is a bequest of personal property, and passes no title to the mortgaged land to the legatee. 2. Where the testator's will gives "*all the real estate* he may die possessed of to A, * * * which property is situate on the north side of N street in said Lowell;" if at the time of his death he was seized and possessed of two lots of land, one on the north and the other on the south side of said street, A takes both lots, unless an intention to the contrary appears in the

will; for a gift by words of general description is not to be limited by a subsequent attempt at particular description, unless such appears to be the intention of the testator from the whole will. Allen v. White, 97 Mass. 504. Opinion by NORTON, J.—*Martin v. Smith.*

STATUTE OF FRAUDS—IMPLIED ASSUMPSIT.—1. It has been settled by numerous decisions that an action will lie to recover back money paid or for services rendered by one party to an agreement which is invalid by the statute of frauds, and which the other party refuses to perform. Kidder v. Hunt, 1 Pick. 328, 331; Gillettt v. Maynard, 5 Johns. 85; Gray v. Hill, Ry. & M. 420; King v, Brown, 2 Hill 480; Basford v. Pearson, 9 Allen 387; Williams v. Bemis, 108 Mass. 91. 2. But this rule does not apply if the defendants are ready and willing to carry such an agreement into full effect. The plaintiff can not force the defendants to take their stand upon the statute. Coughlin v. Knowles, 7 Met. 57; Wetherbee v. Potter, 99 Mass. 361. Opinion by AMES, J.—*Riley v. Willlams.*

MECHANICS' LIEN—MISDESCRIPTION OF PREMISES.—In a petition to enforce a mechanics' lien, it being found as a fact by the court below, that the building erected by the petitioner projected over the line of the respondent's land and upon land of an adjoining proprietor, although the foundation furnished by the respondent was wholly on the respondent's land, and no excuse or explanation being furnished by the petitioner for so erecting the structure that the respondent is apparently made a continuous trespasser on his neighbor's close, it was *held* that no lien for the labor or materials furnished in erecting the building could be maintained. The building is not wholly on the land described in the petition, which brings the case within the doctrine of Stevens v. Lincoln, 114 Mass. 476, and Foster v. Cox., 5 C. L. J. 96. Opinion by SOULE, J.—*McGuinness v. Boyle.*

CORRESPONDENCE.

THE TEXAS CATTLE CASE.

To the Editor of the Central Law Journal:

In a communication, *ante*, 217, Mr. M. L. Low is pleased to state that when "G. G. V." presumes that the fact was not brought before the Supreme Court of the United States that all Texas, Mexican and Indian cattle brought into Missouri between the first day of March and December, bring with them a deadly disease, etc., "'G. G. V.' is quite right. The decision was reached in profound ignorance of any such all important fact." This is not a fair statement. The point made by "G. G. V." was that the court declared the Missouri statute unconstitutional, because it excluded Texas, Mexican and Indian cattle, "*whether diseased or not*;" when, in fact, the disease was imparted to our domestic cattle without any symptom of the malady in the animals which introduced it. In other words, it is impossible to discriminate amongst the class of cattle named in this statute, and the legislature was compelled to prohibit all.

The assertion of Mr. M. A. Low that "it was necessarily admitted on the argument that Texas cattle, which had passed the entire previous winter in Iowa or Nebraska, would not impart disease," is, doubtless, correct; but the admission does not seem to have influenced the decision, for no allusion is made to this "all important" fact in the opinion. On the other hand, the entire decision is based upon the proposition that, whilst some of the Texas cattle may be diseased and others not, yet that no distinction is made by the statute.

Nothwithstanding Mr. M. A. Low's *ex cathedra* exposition, I am not satisfied that the decision is even "ordinarily sound."

G. G. V.

QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—*i. e.*, we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

QUERIES.

10. ENTRY ON LAND—WHEN IS PATENT SAID TO BE "ISSUED?"—A makes cash entry of land in 1837. The patent for said land is made out in in 1838, and lies in the General Land Office at Washington until 1878, when on affidavit of loss of duplicate receipt, etc., the patent is transmitted to affiant. When does the patent emanate from the government, and in whom is the legal title from the time the patent is made out until delivered to patentee? Is the patent "issued" when made out, though it may remain in General Land Office 40 years, or when transmitted from the said office and delivered to patentee? McI.

11. ASSIGNEE OF JUDGMENT — PRIOR UNREGISTERED DEED OR MORTGAGE.—It is an admitted proposition that an assignee of a *chose* in action, such as a note, account, mortgage or judgment may recover from the debtor the whole claim without reference to the amount paid for such therefor. But suppose the assignee of a judgment lien, under the registration laws, comes in conflict with a prior unregistered deed or mortgage. He stands in the attitude of a creditor without notice. Now his right is a naked statutory one, which has been acquired by his purchase, and because the prior purchaser failed to put his deed on record. As against the prior equity—unrecorded—what is he entitled to, the amount he paid or the full amount of the judgment? I.

ANSWERS.

No. 5.

(6 Cent. L. J., 179).

"F" will get some light on the subject of his enquiry by referring to Pierce v. Chicago & N. W. R. R., 36 Wis., 283.

Oshkosh, Wis. H. B. J.

"F" asks whether or not the Courts of Indiana would give an assignee of a debt a right to collect said debt, where the debt arose between citizens of a sister state, and where as between said citizens said debt could not be collected by the remedy sought to be enforced in home courts? Properly the question is, whether or not said courts would enjoin the exercise of a right by reason of comity existing between sister states? It is settled by recent decisions, that an injunction will lie to restrain a resident plaintiff from prosecuting an action against a resident defendant in the courts of another state, to subject wages exempt from attachment by the laws of resident's state. This is on the sole ground that equity can control the actions of parties within its jurisdiction, and punish a violation of its mandate, but in our mind a court would have to be very ingenious which could give a substantial reason for enjoining a resident plaintiff from prosecuting an action against a non-resident defendant, to subject property to payment of debts which, by the laws of the non-resident's state could not be so subjected. Story on Conflicts, secs. 549, 550 and 551, settles this question in our opinion, in treating of jurisdiction and remedy. If the law of defendants' residence is the rule by which courts are governed, then if "A" gave a note in Iowa under limitation law of ten years, and removed from Iowa to Kansas, leaving property or debts due him in Iowa, and as the statute of limitations in Kansas is five years, then we have the sequence that the holder of said note of five years could not attach "A's" property

in Iowa for said note, because by the law of "A's" domicile (Kansas) no action could have been brought on said note. We think that the true rule is that state laws can have no extra-judicial force, except that which may be, and sometimes is, extended to them by statutes of sister states. A state within whose borders any personalty may be situated, has an entire dominion over it, as much as if it were real estate; and being within the jurisdiction of the courts of a state, it will for all purposes of jurisdiction be treated a real estate.

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BOOK NOTICE.

THE DOCTRINES OF THE LAW OF CONTRACTS in their principal outlines, stated, illustrated and condensed. By JOEL PRENTISS BISHOP. St. Louis: Soule, Thomas & Wentworth; The Central Law Journal. 1878.

The undertaking of reducing all the law of contracts into a treatise of less than 300 pages, excluding index and table of cases, is certainly a formidable one, and is one that, in this day of voluminous writing, might well inspire the ambition of the ablest jurist. From the known ability of the author, and from the plan, scope and design of the present work, combined with such execution as simplifies and elucidates the law in all of its parts, we may confidently predict that it will meet very general favor. The book is about the same size as that of Judge Metcalf, on the same subject; but the methods of the two authors are essentially different. Judge Metcalf enters into a minute and critical discussion of the various cases to which he refers, while Mr. Bishop makes no criticism of anything but principles. His work also covers a much larger field than that of his predecessor, which deals only with those conditions that are inherent in contracts generally, omitting many special distinctions which are dwelt upon by our present author with a considerable degree of minuteness.

As to how far it is possible to condense the law, and as to how far it ought to be condensed, are questions about which people are likely to differ. There are some who favor a diffuse style without much regard to the subject-matter of the composition; but we believe that lawyers are usually in favor of rather more brevity than is customary. This feeling must necessarily increase and become stronger as the matter of the law accumulates, making day by day a more tremenduous demand on the capabilities of the memory. Epics are out of fashion, and the seven-volume novels of Richardson are washed over by the waters of oblivion. It makes one of the present age tired only to think of them. We incline very much to think that the writer who knows how to condense should be prized in proportion to the amount of time that he saves to us, and that Mr. Bishop is entitled to the thanks of the profession. He intimates that he might have gone farther, for he speaks of having draped his subject with as "thin a gauze of needless words as the public taste would bear." Truly there is no knowing how far the process may be carried. There have been philosophers who have pretended to convey whole theories, embracing the universe, in a word or in a gesture; but we hardly think the present book could be much shortened. We find but very few words that could be cut out without impairing the meaning. Nowhere does he say, "And now, having examined this point, let us proceed to inquire," etc., or any like introduction. What he has to say he says like one who really has something to say, and who talks with a view to communicate ideas. He quotes all the authorities on the points presented, so that the reader can examine the subjects mentioned in their more minute details, if he wishes to do so.

When we began to read this book, we thought it would be an excellent thing to put in the hands of a student; but as we proceeded we found, without altering our first opinion, that it would be, perhaps, still more useful to the practicing lawyer, who often wishes to find the announcement of some principle, with a list of the cases supporting it, without unnecessary trouble or waste of time. One might very soon familarize himself with a book of this size, so that he would have it all at his fingers' ends; and when he had done so, he would have acquired about all there is of the law of contracts, although, of course of the infinite illustrations and applications of the principles here laid down, very many things, indeed, might be said, which, for the most part, are necessary deductions from propositions which are here stated in all their integrity. The mere case lawyer, who can not grasp an abstraction of any kind, will here find a discipline which may do him good, while the lawyer who perceives beneath all cases only certain truths which they represent, will here discover a supply of palpable and nourishing diet. Our thanks are due to Mr. Bishop. He has been pretty voluminous himself, and this book may make amends for those cases wherein, perhaps, he has used a little more of the gauze referred to than public taste absolutely and unconditionally demanded. U. M. R.

NOTES.

THE study and practice of the law does not necessarily extinguish a literary taste, and the statistics of the public libraries have sometimes been brought forward to prove that lawyers read more novels than do the members of any other of the learned professions. Although the busy practitioner has not usually very much spare time to devote to general reading, it is of the utmost importance that he should keep up with the cursent topics of the day, and to do this he usually makes time. Of all the periodicals among which one must choose—for only a student can expect to read all—the *International Review* (New York: A. S. Barnes & Co.), is, in our opinion, the very best. The March-April number just received is all that could be desired. It contains: Reminiscences of the War, by Hon. Alexander H. Stephens; Elements of National Wealth, by David A. Wells; The Mexico of the Mexicans, by W. T. Pritchard, F. R. S.; Some Noted Women of Bologna, by Madame Vallari, of Italy, and Imperial Federalism in Germany, by Baron Von Holtzendorf, of Munich. The Relations of Morality to Religion are discussed by Dr. A. P. Peabody, and Dr. Samuel Osgood concludes his essay on Modern Love. Two papers on the Method of Electing the President, by Judge Cooley, of Michigan, and Hon. Abram. S. Hewitt, of New York, are particularly interesting at this time. Silver in Art, by Edwin C. Taylor, and New York and Its History, by Gen. J. W. De Peyster, are instructive and readable, and the reviews of contemporary American, English, French and German literature are short and pointed. In every respect the present number entitles this magazine to the first place among the many reviews printed in the English language.

MR. JUSTICE CHRISTIAN, of the Irish Court of Appeal, still, from his seat on the bench, belabors the reporters. His philippics against the Council of Law Reporting swell his judgments to four times their ordinary length; he can not announce a decision without referring to the matter; in short, he experiences the same difficulty in keeping the council out of his opinions, as did the simple-minded Mr. Dick in keeping the name of King Charles out of his memorial. In the last case of his we have seen reported—Shearman v. Kelly, 12 Ir. L. T. 98—after discussing the question of law, he remarked that, as it was made certain by the act of 1876 that the question could never arise again,

the decision now made could never be of any value as an authority in future cases, it was utterly worthless as the subject of a report. But, (and here he gets after the reporters), judging from his own experience of the principle of selection which found favor with the present reporters of the "Irish Reports," it was highly probable that it would be amongst the chosen few. He had said some things in the present judgment which were very capable of being misunderstood or perverted. He took that opportunity of repeating in the Court of Appeal the protest and the warning which he had heretofore given in the Court of Appeal in Chancery, and which was this, that anything that might be attributed to him in the "Irish Reports," in that or in any other case, he now, by anticipation, disclaimed and repudiated. That publication held no recognition or authorization from him, and he entirely distrusted its capacity of producing true reports. If he were asked how could he pronounce that condemnation beforehand, he answered that he inferred the future from the past. He had had his experiences, and he was not going to recapitulate them there. He would not dwell now on the performance in the last August number, the case of Lewis v. Lewis, (see 5 Cent. L. J. 517), a false and vituperative libel, which, after it had been publicly denounced and exposed as such, the "Council of Law Reporting" basely persisted in retaining in the hands of their subscribers unwithdrawn and unretracted. Neither should he dwell on the case of Mackey v. The Scottish Widows' Fund Assurance Company, reported in the last January number. There was, in the present month's number, a case of Daniel v. Freeman, which was rather characteristic. It was a short judgment, but it related to a question of importance and difficulty in the law of bankruptcy, and one on which the court reversed a decision of the present master of the rolls. Therefore, it was obviously a case in which it was extremely desirable that the *rationale* of the decision should have been correctly presented. Well, on a cursory perusal of the report it would be seen to run smoothly enough. The reader would now and then come across a sentence in which he would probably be unable to discover any meaning in particular, but would probably say to himself, "that is because I am not sufficiently master of the facts of the case." Well he (Lord Justice Christian) knew something of the case. He had the manuscript out of which the judgment was read; he took the trouble of comparing it with the report; and he could state now that at those passages of the manuscript in which the point of the argument was evolved, and for the comprehension of which there was needed something like an intelligent mastery of the case, the report ran often into nonsense, and was a set of words strung together with the outward semblance of coherent sentences, but as regarded any bearing on the question at argument, void of all intelligent purpose, pointless and unmeaning. He did not mean at all to say that the work done on the common law side of the reports would necessarily be so bad. He had as yet hardly had the means of judging. To be sure, his experience had not been favorable. But it would require a rare combination of qualities to produce another Lewis v. Lewis. He hoped that, in future, courts of first instance would be so good as to pay no regard to anything which they should find attributed to him in those "Irish Reports."

The jury system is receiving at present something like a thorough examination, and the public, led by the newspapers, is commencing to ask whether it is really a protection or an evil. We propose in a future issue to consider this important question, but at present wish only to notice a very entertaining discussion of the question of unanimity in jury trials—a question whose discussion will precede that of the advisability of abolishing the system—which we find in the columns of a contemporary. The rule requiring unanimity we learn is one which came into existence long after trial by jury became an established fact. According to Lambard, in a jury of twelve the verdict of eight was to prevail, and from Bracton and Fleta it would appear that the practice in their time was for the judges, when the jury could not agree, to add to their number until twelve out of the entire number could be got to concur in a verdict. In the time of Edward I, the judge exercised the option of doing this or of compelling the original twelve to agree by starving them into it. Later it would appear that the option was always exercised in one way—the latter—and so the practice of starving a jury into unanimity became established. A note to Hale's Pleas of the Crown, vol. 2 p. 296, states that the ancient practice was to take the verdict of the majority. If that was so, one of the amendments most in favor in these days would simply be a return to the ancient practice. This practice of forcing unanimity seems to have commended itself with peculiar favor to the minds of our ancestors. Lord Campbell once said to a jury, on discharging them: "At the assizes, according to the traditional law, a jury which could not agree were to be locked up during the assizes, and then carried in a cart to the borders of the next county, and there shot into a ditch." All this harshness has now, however, been mitigated; and the most that can happen to an obdurate jury now is to be locked up for a few hours.

The arguments which are advanced in favor of changing the rule requiring unanimity in the verdict of a jury are pertinent and forcible. "Why," it is said, "should we require unanimity on the part of juries when in no other tribunal and in no other deliberate asssembly do we require it? Elsewhere the decision of the majority prevails. The questions which juries have to dispose of are of the most doubtful, difficult and complicated nature, questions about which the opinions of men differ considerably. Is it not then contrary to all reason and experience to expect that there can be any real agreement of opinion on the part of twelve men selected at random to decide upon them? Is it not in accordance with all experience and reason that many a unanimous verdict pronounced upon such questions must have been brought about by improper compromise among the jurors of their respective opinions?" The opponents of a change, on the other hand, reject altogether the argument derived from the principle that, in deliberate bodies, the decision of the majority must prevail, on the ground that the questions submitted to them involve matters of opinion rather than of fact. "Every divided verdict," said the commissioners, appointed in England, in 1830, to consider the question, "would be urged on the courts as a ground for a new trial, and might not unreasonably be entertained as such. But perhaps the strongest argument in favor of the system is that by requiring unanimity in the verdict, full and complete discussion is insured. Under the present system the minority, instead of yielding too readily to the view of the majority, and purchasing ease and release from further trouble, are naturally led to resist conclusions from which they differ, and for which their sense of duty makes them unwilling to be answerable. Hence arise full discussion and deliberation, and if the one section of the jury yields to the other, it is only because the prolonged discussion has led to altered convictions. We are, therefore, of the opinion that the present rule requiring the jury to be unanimous should be maintained." These are the pros and cons of the subject, and they are likely to be carefully examined in the near future. On the continent of Europe, and in Scotland, unanimity is not required. The same may be said of the statutes of Texas and Nevada, and a bill is at present before the legislature of New York providing for a like change.